Health Management, Inc. *and* General Drivers, Salesmen & Warehousemen's Local Union No. 984. Case 26–CA–17505

August 27, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN AND HURTGEN

This case involves allegations that the Respondent committed several violations of Section 8(a)(1) and (3) of the Act.[1] The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.

In late March 1996, the Union began a campaign to represent the Respondent's production and maintenance employees. In late May or early June, Respondent's district manager, Sherrill Stevens, conducted a meeting with four working supervisors. (There are no exceptions to the judge's finding that these individuals were statutory employees, not supervisors within the meaning of Section 2(11) of the Act.) Shift Supervisor Aaron Shields credibly testified that Stevens commenced the meeting by talking about the Union's campaign. Stevens then asked what the employee complaints were about, and said that she "wanted to know why it went as far as it did, without going through her first because she wanted to be given the opportunity before it went as far as the Union."

Stevens had only begun work as the Respondent's senior executive on April 1. The judge relied on this fact to find that, in her meeting with the shift supervisors 2 months later, Stevens voiced a permissible inquiry "as to the problems leading to the Union campaign and employee dissatisfaction with management as a new manager having only commenced her employment with Respondent in April." He therefore recommended dismissal of the complaint's allegation of unlawful solicitation of grievances. We disagree.

It is well established that "the solicitation of grievances at preelection meetings raises an inference that the employer is making [a promise to remedy them], which inference is rebuttable by the employer." *Uarco Inc.*, 216 NLRB 1, 2 (1974). The record does not support the judge's reasoning that Stevens' status as a new manager was sufficient to rebut this inference. Stevens herself did not testify about this specific meeting. She did testify that she had participated in general meetings and in safety meetings with employees during her first two months on the job. Neither she nor any other witness to this proceeding testified that she used any of these meetings to familiarize herself with workplace issues and employee grievances. Consequently, the first evidence we have of her efforts to solicit such grievances involves a meeting that Stevens convened specifically to discuss the Union's campaign.

Under these circumstances, we find that Stevens' relatively recent arrival at the Respondent's facility does not rebut the inference of a promise to remedy those grievances as an alternative to union representation.[3] Indeed, we find that Stevens' references to "going through her first" and giving her an "opportunity before it went as far as the Union" support this inference. So, too, does the undisputed fact that on May 31 Plant Manager Glen Gross unlawfully interrogated employee Warrick Tennial by asking "why would [you] want to negotiate a union give [Stevens] a try."

We note that our dissenting colleague cites the previously disputed legal status of the shift supervisors as a factor weighing against an unfair labor practice finding. We find it immaterial whether she was soliciting the grievances of the shift supervisors or whether through them she was soliciting the grievances of other employees. The unlawful objective effect of such conduct is the same in either event. Statutory employees would reasonably believe that Stevens was impliedly promising to remedy those grievances in an effort to defeat the Union's organizational campaign.[4] Accordingly, we find that the Respondent's solicitation of grievances violated Section 8(a)(1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Health Management, Inc., Memphis, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order as modified.

1. Insert the following as paragraph 1(c) and reletter the subsequent paragraphs.

[1] On August 22, 1997, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, cross-exceptions, and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] Accord: *Blue Grass Industries*, 287 NLRB 274, 286 (1987) (fact that manager moved up through the ranks and was newly promoted to her job does not overcome inference of unlawful solicitation and promise to remedy employee grievances).

[4] Chairman Gould agrees. He notes further that this finding is in accord with his view that actions directed at supervisors are unlawful when they have a chilling effect on employees' rights to engage in protected or union activity. *General Security Services Corp.*, 326 NLRB No. 42, slip op. at 3 (1998) (Chairman Gould, concurring).

"(c) Soliciting grievances from employees with the implied promise to rectify them in order to affect employee support for the union."

2. Substitute the attached notice for that of the administrative law judge.

MEMBER HURTGEN, dissenting in part.

Contrary to my colleagues, and in agreement with the judge, I do not find that the Respondent violated Section 8(a)(1) based on District Manager Sherrill Steven's May/June 1996 statements to "shift supervisors" Byles, McFarland, Matthews, and Shields.[1] I agree with the judge that, under all the circumstances, Stevens' comments did not constitute an unlawful solicitation of employee grievances.

It is well settled that a mere solicitation of grievances during a preelection period does not violate the Act. See, e.g., *NLRB v. Arrow Molded Plastics,* 653 F.2d 280, 283 (6th Cir. 1981). Solicitation of grievances becomes unlawful only where it is accompanied by an implied or express promise that the grievances will be remedied if the employee foregoes union representation. See, e.g., *Idaho Falls Consolidated Hospital v. NLRB*, 751 F.2d 1384, 1386–1387 (9th Cir. 1984). Under the instant facts, I find that this test has not been met.

Within weeks of her hire by the Respondent, Stevens learned of the Union's organizing campaign. In response, she met with the shift supervisors. As found by the judge, it was a very close legal issue as to whether they were statutory supervisors rather than employees. In the meeting, Stevens inquired about employee complaints and said that she wished that the matter had gone through her before "it went as far as the Union." Stevens said that she wanted to hear, from the shift supervisors, "what was going on." Stevens did not tell the shift supervisors, or intimate, that she would remedy any grievances. And, even if she did, she did not express or imply that the remedy was conditioned on rejection of the Union. Rather she simply was trying to ascertain what, if any, grievances *led to* the Union's campaign. Since she was a new district manager, the inquiry was an understandable one. She also was not soliciting grievances from the particular grievants, but rather from persons whom she thought to be supervisors. And, the persons to whom she spoke were selected because they were "supervisors" and not because they could be "bought" with promises.

The majority argues that the solicitation of grievances at a preelection meeting gives rise to a rebuttable inference of a promise to remedy them. They reject the relevance of Stevens' good-faith belief that the shift supervisors were statutory supervisors. They find that it is immaterial whether Stevens was soliciting the grievances of the shift supervisors or those of employees working under them. I disagree, for I find that the evidence does not establish a solicitation of grievances from either group. Stevens asked the shift supervisors to keep her informed of "employee" complaints. She did not ask the shift supervisors to solicit employee complaints. She did not ask the shift supervisors for their complaints. And she did not request the shift supervisors to tell employees that management wanted to know about employees' complaints. It may be that soliciting an individual's complaints suggests to the individual that the complaint will be remedied and may give that individual the hope of a remedy. However, that cannot be the case when the complainant does not know that his complaint has been solicited and thus cannot have any logical anticipation of improved conditions.

Further, even if one could infer that the Respondent was soliciting employee grievances and promising to remedy them, there is no evidence to show that the promise was conditioned on the employees' rejection of the Union.

In sum, this was an effort of a new district manager to find out what was going on at the plant and what had led to the Union's campaign. It was neither intended nor reasonably seen as an effort to purchase antiunion allegiance by promising benefits in return for a rejection of the Union.

In these circumstances, I agree with the judge that Stevens' comments did not violate the Act.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize;
>
> To form, join or assist any union;
>
> To bargain collectively through representatives of their own choice;
>
> To act together for other mutual aid and protection;
>
> To choose not to engage in any of these concerted activities.

WE WILL NOT interrogate employees concerning their union activities and sympathies and the union activities and sympathies of their fellow employees.

WE WILL NOT threaten employees with loss of their jobs if they engage in concerted activities on behalf of a union.

WE WILL NOT solicit grievances from our employees with the implicit promise to rectify them in order to affect their support for the Union.

[1] Although their title is "shift supervisor," there are no exceptions to the judge's finding that they are statutory employees.

WE WILL NOT suspend and discharge our employees for engaging in concerted activities on behalf of a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days from the date of this Order, rescind the suspension and discharge of Anthony Featherson and WE WILL offer him reinstatement to his former position, or if his former position no longer exists, offer him a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Anthony Featherson whole for any loss of earnings and other benefits, resulting from the discrimination against him, less any net interim earnings, plus interest.

WE WILL within 14 days of the Board's Order, remove from our files any reference to the unlawful discipline issued to employee Anthony Featherson and WE WILL within 3 days thereafter, notify him in writing that this has been done and that the unlawful discrimination will not be used against him in any manner.

HEALTH MANAGEMENT, INC.

Tamra J. Sikkink, Esq., and *Ronald K. Hooks, Esq.,* for the General Counsel.

R. Brent Ballow, Esq. (King & Ballow), of Nashville, Tennessee, for the Respondent.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN**,** Administrative Law Judge. This case was heard by me on May 7 and 8, 1997, in Memphis, Tennessee, and is based on a second amended charge filed by General Drivers, Salesmen & Warehousemen's Local Union No. 984 (the Charging Party or the Union) on January 2, 1997. The complaint in this case was filed by the Regional Director for Region 26 of the National Labor Board (the Board) and alleges that Health Management, Inc. (the Respondent or the Company) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by interrogating and threatening employees concerning their union activities and violated Section 8(a)(3) and (1) of the Act by discharging its employees, Anthony Featherson and Aaron Shields, because of their assistance of the Union and their engagement in concerted activities and to discourage employees from engaging in these activities. The complaint is joined by the answer filed by the Respondent on January 21, 1997, wherein it denies the commission of any violations of the Act.. The complaint was amended at the hearing. Upon due consideration of the testimony of the witnesses and the evidence received at the hearing and the briefs filed by the parties and their positions at the hearing, I make the following

FINDINGS OF FACT[1]

I. THE BUSINESS OF THE RESPONDENT

The complaint alleges, Respondent admits, and I find that at all times material Respondent has been a corporation with an office and place of business in Memphis, Tennessee, where it has been engaged in the collection and processing of medical waste, that during the 12-month period ending December 31, 1996, Respondent, in conducting its above-business operations, sold and shipped goods, products, and services valued in excess of $50,000 directly to points outside the State of Tennessee and purchased and received at its facility goods valued in excess of $50,000 directly from points located outside the State of Tennessee, and that Respondent has been an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that at all times material the Union has been a labor organization within the meaning of Section 2(5) of the Act.

As set out above, Respondent processes medical waste. It does so by incinerating the waste in its furnaces and transferring the ash created thereby by small 2-cubic foot bins with the aid of a forklift truck to large 22–foot long bins (Open-tops) which are transferred by truck to hazardous waste sites. The large bins must be lined with plastic liners to prevent leakage from the bins as they are taken by trucks on public streets and highways as the ash material is wet after its removal from the furnace. In performing this function the Respondent is subject to Federal, state, and local laws and regulations in order that it does not endanger the public welfare in carrying out its responsibilities. Respondent is a subsidiary of Browning Ferris Industries (BFI), a waste processing company. As a processor of medical waste Respondent has employees at its facility who engage in the processing and transference of the waste and maintenance work. On April 1, 1996, Respondent employed Sherrill Stevens as its district manager. She testified that Respondent operated as an independent company and she was equivalent to its chief operating officer. The operations manager was James Elmore. The plant manager was Glen Gross. There were four shift supervisors, Maurice McFarland, Aaron Shields, Tim Byles, and Mike Matthews. Gross was in charge of long haul transportation from other BFI facilities and customers and reported to Elmore. The four supervisors could report to Gross, Elmore, and Stevens. The Company operated two 12-hour shifts at its processing facility on a rotating basis with employees scheduled to work several days on and 3 days off.

On March 28, 1996, incinerator operator Anthony Featherson contacted the Union about seeking union representation and was given 30 union authorization cards, which he distributed among the facility's employees. The maintenance employees refused the cards. He collected 25 or 26 cards from the processing employees and returned them to the Union on March 30. Union Business Manager John Bratcher gave him a union hat and union buttons for all employees and he gave out 25 buttons and started to wear the hat on March 30. Ten employees began to wear the buttons at that time. He and two other employees

[1] On August 8, 1997, I entered an order to correct the transcript in accordance with the General Counsel's unopposed motion to do so. The order and the attached corrections are designated, omitted from publication, and received as ALJ Exh. 1 and made a part of this record.

handbilled on behalf of the Union for several weeks. On May 31, the Regional Office for Region 26 of the Board mailed a letter to the Union advising of the filing of a petition to represent Respondent's production and maintenance employees and enclosing a copy of the petition filed by the Union which was received by Respondent shortly thereafter. On June 6, the Respondent suspended Featherson for emptying ash into the open-top without a liner and subsequently discharged him by its letter of June 11 purportedly for this incident as well as his overall record. Featherson had handbilled on his scheduled days off on the 3 days prior to June 6 and on the first day of handbilling Manager Stevens had required them to move outside Respondent's property. On another occasion she had waved to them and Featherson had waved back.

During the course of the Union's campaign, the Respondent is alleged to have engaged in interrogation and threats of its employees and to have solicited grievances from its employees with the implied promise of remedying them in response to the organizing effort. Former employee Frederick Johnson testified that Plant Manager Gross called him into his office which was unenclosed and was adjacent to the employee breakroom and said that "I heard about all this union activity going on round here and I heard that you was one of the guys involved in it. . . . He said, we don't want to have no union round here." Johnson also testified that there were several employees in the breakroom at the time who heard Gross' comments. Johnson's testimony was corroborated by Featherson who testified that Gross told Johnson that "he was going to be scratching his unemployed ass if he keep on with this organizing with the Union." I credit Johnson's and Featherson's testimony in this regard which was unrebutted as Gross, although still employed as Respondent's plant manager at the time of the hearing, was not called to testify. Moreover, Gross' absence at the hearing gives rise to the inference that his testimony would have been adverse to the Respondent's position in this case. *International Automated Machine*, 285 NLRB 1122 (1987). I reject Respondent's unsupported arguments that Johnson's and Featherson's testimony should not be credited as a result of their admitted disaffection with Respondent's actions in terminating them and their relationship as cousins. I thus find that Respondent violated Section 8(a)(1) of the Act by Gross' threat of termination issued to Johnson because of his support of the Union. *Link Mfg. Co.*, 281 NLRB 294, 298 (1986) I also find in agreement with the General Counsel's position that Gross' statement to Johnson constituted unlawful interrogation as his comment that he heard that Johnson was involved in union activities in conjunction with his unlawful threat to Johnson was clearly interrogation directed at Johnson and I find that Respondent violated Section 8(a)(1) of the Act in this regard also. *Rossmore House*, 269 NLRB 1176, 1177 (1984). *Link Mfg.*, supra.

The testimony of former employee Warrick Tennial also establishes that Plant Manager Gross engaged in three separate incidents of interrogation of him concerning his support of the Union. Tennial had been employed by Respondent on two occasions. He was initially employed in November 1992, but left 6 months later when his hours were reduced. He was reemployed in November 1995, and was terminated in April 1996 for absenteeism. The incidents of interrogation occurred a few days prior to Tennial's wearing a union button for the first time on May 31, the date of the filing of the petition. Gross approached Tennial on the dock and asked, "Why would I want to negotiate a union . . . give [Stevens] a try." The second incident occurred on the same day when Gross asked Tennial in the presence of several other employees in the breakroom in reference to his support of the Union, "after all he has done as getting me back hired at BFI (Respondent's parent company) why would I do this?" The third incident occurred the next week and also occurred in the employee breakroom when Gross again asked Tennial why he would want to "negotiate a union after all [Gross] has done for me as far as giving me the job at BFI?" The references are to Tennial's return to employment with Respondent after his prior termination of employment. I credit Tennial's unrebutted testimony as set out above as Gross did not testify thus giving rise to the inference that his testimony would have been adverse to the Respondent' position regarding these incidents and I find that Respondent violated Section (8)(a)(1) in each instance as Gross' inquiries were inherently coercive and clearly conveyed the message that Gross was responsible for Tennial's employment and was displeased with Tennial's support of the Union. *Swift Textile, Inc.,* 214 NLRB 36 (1974**).**

Aaron Shields, who is alleged as a discriminatee in this case as he was discharged from his position as a shift supervisor by Respondent in June 1996, testified regarding a meeting held by District Manager Stevens in late May or the beginning of June with the four shift supervisors, Tim Byles, Maurice McFarland, Mike Matthews, and Shields. Shields testified that Stevens commenced the meeting by saying, "I'm not allowed to talk directly about the Union. There are certain things I can and cannot say." She had a list in front of her which she referred to "that she could or could not say. . . . 'As far as the Union, she just wanted to find out what all the complaints were, the complaints that the workers had on the floor and wanted to know why it went as far as it did, without going through her first because she wanted to be given the opportunity before it went as far as the Union."' Stevens asked to hear from the shift supervisor s and Matthews spoke on the pay and they all spoke on the conditions, the lack of a pay scale and an employee handbook setting out the policies of the plant. Shields told her that there were no policies, no handbooks and that "I wasn't informed of anything when I became working supervisor. Everything I found out I found out on my own." Shields wore his union button at this and a second meeting held by Stevens in June with the shift supervisors and at every safety meeting he attended after signing a union card on April 9. Shields was discharged by Respondent for a recurring absenteeism and tardiness problem on June 14 which will be addressed infra. In considering his case and this alleged violation of soliciting grievances by Stevens I have determined infra that the shift supervisors were employees and not supervisors within the meaning of the Act. Although I have found that the shift supervisors were employees within the meaning of the Act, this was a close legal question and I find that under the circumstances of this case the inquiry by Stevens of the shift supervisors as to the problems leading to the union campaign and employee dissatisfaction with management as a new manager having only commenced her employment with Respondent in April does not rise to a violation of the Act. I accordingly shall recommend the dismissal of this allegation in the complaint.

A. The Suspension and Discharge of Anthony Featherson

1. Facts

Featherson was initially employed by Respondent in January 1994. He was employed as an autoclave operator. He success-

fully completed his probationary period, received good ratings, and received raises. He was promoted to the position of supervisory trainee and was promoted to the position of shift supervisor in September 1995. However, he incurred some problems in his job performance. On one occasion he damaged a truck while moving it and received a warning. On April 3, 1996, he received a warning for an incident on March 28, 1996, when he drove a truck off the jacks while the tires were being changed. The April 3 warning which was issued by Elmore listed three previous warnings issued by Elmore and stated that any additional warning issued within 90 days would result in dismissal. He was also demoted to the position of incinerator operator as a result of this incident. Featherson was the leading union advocate among the employees having initially contacted the Union in late March 1997, solicited union cards among his fellow employees, has been the sole employee to wear a union hat, passed out and worn union buttons, and he and two other employees handbilled in front of Respondent's facility for 3 days prior to his suspension on June 6 leading to his discharge on June 11. On May 31, Region 26 of the Board mailed a copy of the Union's petition for an election to the Respondent and it was stipulated and I find that it was received by Respondent shortly thereafter and that Respondent was aware of it by June 6.

On June 6, Featherson, who was then an incinerator operator, reported for work at the start of his 12-hour shift at 6 a.m. As an incinerator operator, he was responsible for maintaining the incinerator and dumping the medical waste product generated from the incinerator in the form of a wet ash from a 2-cubic foot bin with the use of a forklift truck into a large 22-cubic foot bin (an open-top) which is subsequently transported by truck to hazardous waste storage sites. As the trucks travel along the streets and highways, they are subject to Federal, state, and local laws and regulations. It is undisputed that the open-tops are to be lined with a plastic liner designed for that purpose to avoid leakage during the trip to the storage site. There was undisputed record testimony that although the incinerator operator had primary responsibility for the dumping of the ash into the Open-top bin, that other employees frequently perform this task on an as needed basis when they observe that the ash bin near the furnace is full and the incinerator operator is engaged in performing other aspects of his job. The General Counsel presented several witnesses who testified that they had observed several occasions when the Open-top had ash in it without the placement of a liner prior to the ash having been emptied into it. Featherson testified that he had learned of Respondent's various procedures from other employees including the dumping of the ash in the Open-top bin and that a liner should be placed in the Open-top bin prior to dumping the ash in it.

Former Shift Supervisor Aaron Shields testified that he attended various safety meetings held by the Employer and that the subject of liners was never mentioned. The only conversation he had with James Elmore concerning the dumping of the ash was on the day of Featherson's suspension when Elmore came by where he was working about 10 or 11 a.m. and asked him if he knew who had dumped the ash without a liner. About 2 or 3 p.m. that day Featherson came by and said that he was "gone." Shields was called to Stevens' office about 3 or 3:30 p.m. and asked by Elmore and Stevens if he knew who had dumped the ash and he said he did not know as he had been on the other side of the plant moving trailers. Stevens agreed with this and said that she had observed him on the other side. About 3 or 3:30 p.m. that day Gross came by and said that Stevens had said that the next person who dumped ash in the bin without a liner was gone. Prior to this day he was not aware of any employee having been suspended for this and had never been advised that employees would be suspended for this. Elmore admitted at the hearing that no employee had ever been disciplined for dumping ash in the Open-top without a liner but contended that Stevens was tightening up on procedures and indicated that this was part of this overall effort. Stevens stressed at the hearing that it was important to have a liner in the Open-top because of the need to comply with Federal, state, and local laws and regulations. It is undisputed that Respondent had never promulgated a rule that disciplinary action would be imposed for failing to place a liner in the open-tops before dumping ash in them. Each of the General Counsel's witnesses testified that the need for a liner in the open-top had never been discussed in any of the various safety meetings held by management with the employees. Elmore testified that it had been mentioned but did not specify as to whom and where and when it had been mentioned.

Featherson testified that when he arrived at work at 6 a.m. on the day of his suspension leading to his discharge, he relieved Van Campbell, the incinerator operator on the night shift. He observed that the incinerator area had been left in a "nasty, filthy" condition with ash on the floor. Campbell told him that he would clean it up but when he looked for Campbell 15 minutes later, he was gone. He started cleaning the area. About 15 minutes later Gross came to this area and said that ash was off in the bin outside and that Stevens had said that the next time this happened, someone was going to be fired, Gross asked him if he had done it and Featherson said that he had not. The conversation with Gross occurred about 6:30 a.m. in the incinerator area. Gross was complaining about the whole area being dirty and ash having been dumped in the bin without a liner. Featherson then went outside to look at the area and observed maintenance employee Tommy Carter and another employee cleaning it up and he assisted them in getting the ash out of the bin in order to put a liner in the bin.

At the hearing, the Respondent called Carter who testified his shift began at 7 a.m. and that as he was making his rounds checking throughout the plant to determine if anything was in need of repair, he arrived at the dock about 7:30 a.m. and he observed a mess by the large open-top bin and that Nesser, the cleanup man, was cleaning it up and Nesser asked him to help him put the liner in but after he and Nesser rolled the liner out but before they were able to put the liner in the open-top Carter was called away to fix the tub wash and he does not know what happened after that. About an hour later Featherson came and asked him for a chain as the small ash bin was in the open-top and he then went with Featherson and helped get the small ash bin out of the Open-top. When he had originally been helping Nesser put the liner in the Open-top, he had not observed whether there was ash in the bin but the ash bin was not in the open-top at that time. When Featherson had asked him for the chain, he did not say that he had dumped the ash bin in the Open-top but it had not been in there before. He was called into Stevens' office shortly before noon the day of this occurrence and asked by her what had occurred in the presence of Stevens and his supervisor, Jerry Weatherly, and he told her substantially what he testified to at the hearing. He testified that during the period of his employment, since April 1995, he

had observed employees dump ash in the Open-top without a liner and this had been observed by supervisors without any disciplinary action being taken. On further inquiry he was only able to recall one instance when this had occurred and testified that there was an argument about it and a meeting was held concerning it. This was prior to Stevens' arrival in April. He does not recall whether the subject of discharge was mentioned during this meeting. He does not recall any meeting at which Stevens discussed the liners.

With respect to the dumping of ash without a liner into the Open-top, Tennial testified that as a dock worker he frequently dumped the ash bin into the Open-top and did so without a liner on at least seven occasions and did so once in the presence of Plant Manager Gross who mentioned it to him and he told Gross there was no liner available and Gross said no more about it. Tennial testified that he was never given any instructions from management concerning the placement of a liner in the Open-top but that he was told to put a tarp over the top when it was full to keep the ash from blowing out. Tennial is a cousin of Featherson and acknowledged that Featherson had helped him get his job with Respondent. Tennial was discharged in April 1996 for excessive absenteeism.

Frederick Johnson, who is also a cousin of Featherson and who was employed approximately 3 months as an autoclave operator and dockhand until his termination by Respondent, testified concerning the dumping of ash in the Open-top. He attended approximately four meetings regarding safety and operating procedures including the operation of machinery. He does not recall the subject of liners being discussed in these meetings including one attended by Stevens who commenced her employment with Respondent on April 1, 1996. He testified that he worked on the night shift with only three or four employees including the shift supervisor on duty. He had been told by Featherson that there should be a liner in the Open-top prior to dumping ash in it but there was not always a liner available and Johnson had dumped ash into the Open-top without a liner on 17 occasions. On several occasions he observed the open-top with ash having been dumped in it without a liner by the previous shift. On one occasion when he dumped the ash in the Open-top without a liner, he was observed by employee Van Campbell. He cannot recall any instance when he was observed by members of management while dumping the ash without a liner.

Van Campbell, a former employee who was terminated by Respondent in 1996, testified concerning the dumping of ash. In May and June 1996 he was employed as the night incinerator operator and on two occasions he dumped ash in the Open-top without a liner as there was none available in the immediate area. He placed the second instance on May 26 when he left work to go to the hospital where his wife was. On that instance he was relieved by Featherson that morning. The condition of the incinerator area that morning was "messy." He later learned that Featherson had been suspended. Respondent's counsel notes in his brief that the date of Featherson's suspension and the instance of ash found in the Open-top without a liner was June 6.

2. Analysis

I find that the General Counsel has established a prima facie case that the Respondent violated Section 8(a)(1) and (3) of the Act by its suspension and discharge of Featherson. It is undisputed that Featherson initiated the union campaign at the Respondent's facility and was the leading union supporter who had obtained the union authorization cards from the Union and solicited the employees and obtained approximately 25 signed union cards from his fellow employees. He was discharged for an alleged infraction of an unwritten rule which is of questionable origin and for which no employee had been disciplined previously. This occurred almost immediately on the first day of his return to work following 3 days during which he was off in accordance with his normal schedule and during which he and two other employees had handbilled on behalf of the Union in full view of Respondent's district manager, Stevens, who had required the employees to move off the Respondent's property on the first day of the handbilling and who had waved at the employees while they were handbilling on a subsequent day. Thus, it is undisputed that the Respondent had knowledge that Featherson had engaged in protected concerted activities on behalf of the union campaign. Respondent's animus toward the Union and its supporters has been established by the unlawful interrogation of two employees and a threat directed at employees by Plant Manager Gross. An adverse employment action was taken against Featherson and there is evidence of disparate treatment thereby as this alleged rule had never been formally disseminated to employees and there had been no prior discipline for its violation. The close timing of the handbilling engaged in by Featherson and his suspension and discharge by Stevens on the basis of a questionable determination in a rush to judgment that he was the employee who had dumped the ash into the Open-top without a liner, in spite of his denial and in the absence of any substantial evidence that he had done so, support the inference that the reasons cited by Stevens for his suspension and discharge were pretextual. I do not credit Stevens that the alleged ash dumping infraction by Featherson was the reason for the disciplinary action taken against Featherson. I thus find that the General Counsel has sustained his burden and has established that Respondent's animus toward the Union was a substantial motivating factor in its imposition of the disciplinary action taken against Featherson. I find that Respondent seized on this incident to rid itself of the leading union supporter shortly after it received notice that the Union had filed a petition for an election in order to thwart the Union's campaign. I find that Respondent has failed to rebut this case by the preponderance of the evidence and has failed to demonstrate that the adverse action would have been taken against Featherson in the absence of his engagement in concerted activities on behalf of the union campaign. *Wright Line*, 251 NLRB 1083 (1980*); Manno Electric, Inc.,* 321 NLRB 278 (1996).

B. The Suspension and Discharge of Aaron Shields

1. Facts

Aaron Shields was employed as a shift supervisor by Respondent at the time of his suspension and discharge. The complaint alleges and the General Counsel contends that the Respondent violated Section 8(a)(1) and (3) of the Act by the suspension and discharge of Shields in June 1996. The Respondent contends that Shields was discharged for cause because of a continuing attendance and tardiness problem for which Shields was warned on several occasions by the issuance of written warnings on September 14, 1995, for coming into work late and on January 25, 1996, for violation of a safety rule for not wearing a safety mask and in both instances was warned that any further incidents could lead to further discipline up to and including discharge. In February 8, 1996, Shields received

a warning for being absent three times and tardy four times in January and tardy one time in February. The warning stated that any further incident would result in "dismissal." Notwithstanding these warnings Shields was given an "employee of the month" award in February and was made a shift supervisor on April 1, 1996, in place of Featherson who had been demoted in late March for damage to the truck which he had driven off the jacks which were used to support it during a tire change. Shields' attendance and tardiness problems continued however and he was late five times and absent on two occasions in April and May until his suspension in June. However, he was not disciplined on these occasions. Shields testified that on one occasion he asked and obtained permission from Elmore to be absent in order to attend a school function for his daughter and on another occasion he switched a day off with a non-supervisor and did not advise management of this. On the day of his suspension on June 14, 1996, Shields was at least one hour and 45 minutes late according to the discipline record and the unrebutted testimony of Elmore whom I credit in this regard. Shields acknowledged these incidents but contended that he called Elmore and told him he would be late on these various occasions and Elmore said, "[O]kay" until the time of his discharge. Shields signed a union card on April 9 and thereafter wore a union button. The General Counsel argues in brief that Shields was discharged because of his prounion activities citing his testimony that he spoke up in a meeting held by Stevens with the four shift supervisors when Stevens asked for comments as to the reason for the advent of the union campaign (I note that other shift supervisors also spoke out at the meeting) and also cites another instance when he was questioned in the breakroom by Shift Supervisor Maurice McFarland regarding his union sympathies and McFarland immediately thereafter told Stevens, Elmore, and Gross who were approaching that it was not going to be easy in an apparent reference to Respondent's response to the union campaign. Shields testified that later that same day, McFarland approached him on the dock and told Shields to tell him all the advantages of union representation. Respondent contends that Shields was a supervisor within the meaning of Section 2(11) of the Act and accordingly was not entitled to the protection of the Act accorded "employees" under the Act. Respondent also contends that Shields was discharged for a continuing absenteeism and tardiness problem.

With respect to the issue of the supervisory status of shift supervisors' the evidence presented by the General Counsel established that Shields was never told by management what his authority was as a shift supervisor and he did not issue discipline to employees, did not grant time off without obtaining approval from higher management, did not approve timecards but on a few occasions, Shields did initial timecards when Elwood and Gross had gone home and there was a discrepancy on the card in order to keep management informed. Shields had never permitted an employee to go home early unless they had spoken to Elmore. Shields testified that he had never been informed by management that he had the authority to issue discipline although another shift supervisor had told him that he had the authority to issue writeups. Shields had never issued discipline. On one occasion he had notified management that two probationary employees had not returned from lunch and was authorized to call the temporary service that furnishes temporary employees to Respondent and request that additional employees be sent to Respondent. Shields spent 97 percent of the time on his shift performing unit work alongside his fellow employees. Shields followed a checklist to employees. Shields followed a checklist to check the machinery at the beginning of his shift which took a total of 20 minutes on his 12-hour shift. He assigned employees work as required. The employees to whom he assigned work were regularly designated to perform defined routine tasks and he only reassigned when there was a breakdown in machinery and he also assigned work to temporary employees who were used to perform unskilled labor such as shoveling ash and washing out tubs. There was no evidence presented that the shift supervisors exercised independent judgment of other than a routine nature. This testimony was corroborated by Featherson, Tennial, and Johnson who testified that the shift supervisors did not have the authority to grant time off and that they had never observed the shift supervisors engage in any of these supervisory activities as well as Featherson's testimony that he had never performed any of these supervisory duties during the period when he was a supervisor prior to his demotion. Respondent contends that the shift supervisors were "solely responsible for work of employees on their particular shift." It contends that they "had the authority to issue oral and written discipline, send employees home for misconduct or failure to perform their work, assign employees work, transfer employees, and approve time cards." It contends that they "exercised independent judgment in exercising this authority."

2. Analysis

The Respondent did not rebut the testimony of Shields, Featherson, Tennial, and Johnson as witnesses Stevens and Elwood were not questioned concerning the duties of the shift supervisors and as noted previously in this decision, Gross was not called to testify giving rise to the inference that his testimony would have been adverse to the Respondent's position in this regard as well as with regard to the other aspects of this case. I thus credit their testimony which supports a finding that the shift supervisors are leadmen and not supervisors. I conclude the evidence at the hearing relied on by the Respondent did not meet its burden of proof necessary to establish that Shields was a supervisor within the meaning of Section 2(11) of the Act so as to be excluded from the protections afforded employees under the Act. I find that the shift supervisors are essentially leadmen who spend the vast majority of their time performing routine work in the processing of medical waste for safe transport to hazardous waste storage facilities. The record contains only meager evidence of the exercise of any of the indicia of supervisory authority set out in Section 2(11) of the Act. Moreover there is no evidence that they are exercised in other than a routine manner on occasion such as telling an employee to wash out tubs or move to another job in the event of equipment failure and to ask employees to stay over on another shift when it is learned that there is not a full complement of employees for the next shift. *J. C. Brock Corp.*, 314 NLRB 157 (1994). See also *Evangeline of Natchitoches, Inc.*, 323 NLRB 223 (1997).

With respect to the discharge of Shields, I conclude that the General Counsel has established a prima facie case of a violation of Section 8(a)(1) and (3) of the Act. The Respondent had knowledge that Shields supported the Union as a result of his speaking out at the shift supervisors' meeting, his display of a union button since early April and McFarland's informing management that it was not going to be easy after speaking to Shields in reference to the union campaign. Respondent's animus toward the Union has been established by; reason of Gross' threat and interrogation. Additionally Shields' dis-

charge occurred shortly after the handbilling engaged in by Featherson and two other employees and after the petition for an election and after the discharge of Featherson. There was evidence presented by the General Counsel wherein supervisors received warnings of attendance and tardiness problems and wherein the Respondent took no action to discharge them. There was also evidence presented by the Respondent wherein it had discharged employees for attendance and tardiness problems Thus there is some evidence of disparate treatment, but I do not regard it as conclusive. However, I do not conclude that Shields' continuing attendance and tardiness problems were being indefinitely tolerated up to and including the final tardiness incident leading to his suspension and discharge. I rather conclude that the Respondent suspended and discharged Shields as it warned him it would because of his continuing attendance and tardiness problem and would have done so even in the absence of his engagement in concerted activities on behalf of the union campaign. *Wright Line*, supra; *Manno Electric*, supra.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by interrogation of and threat of job loss issued to employee Frederick Johnson by Plant Manager Glen Gross concerning Johnson's support of the Union.

4. Respondent violated Section 8(a)(1) of the Act by the coercive interrogation of its employee Tennial Warrick concerning his support of the Union engaged in by its Plant Manager Glen Gross on three separate occasions.

5. Respondent did not violate the Act by the alleged unlawful solicitation of grievances by District Manager Stevens and I shall recommend the dismissal of this allegation of the complaint.

6. Aaron Shields was at all times material an employee within the meaning of the Act.

7. Respondent violated Section 8(a)(1) and (3) of the Act by its suspension and discharge of employee Anthony Featherson.

8. Robertson did not violate the Act by its suspension and discharge of employee Aaron Shields and I shall recommend the dismissal of this allegation of the complaint.

9. The above-unfair labor practices in conjunction with the status of Respondent as an employer affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

Having found that the Respondent has violated the Act it will be recommended that Respondent cease and desist therefrom and take certain affirmative actions designed to effectuate the purposes and policies of the Act and post the appropriate notice.

It is recommended that Respondent rescind the unlawful suspension and discharge of employee Anthony Featherson and immediately offer him full reinstatement to his former position or to a substantially equivalent position if his former position no longer exists and that Respondent make him whole for all loss of backpay and benefits sustained as a result of the discrimination against him by Respondent in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1982). Interest shall be computed at the "short term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. Section 6621.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Health Management Inc., Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their union activities and sympathies and the union activities and sympathies of their fellow employees.

(b) Threatening employees with loss of their jobs if they engage in concerted activities in support of a union.

(c) Suspending and discharging employees because of their engagement in concerted activities in support of a union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, rescind the unlawful suspension and discharge of its employee Anthony Featherson and offer him reinstatement to his former position, or if his former position no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Featherson whole for all loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the foregoing unlawful discrimination against said employee and within 3 days thereafter notify him in writing that this has been done and that the unlawful discrimination will not be used against him in any way.

(d) Preserve and within 14 days of a request , make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Memphis, Tennessee, copies of the attached notice marked "Appendix."[3].Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted By Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court Of Appeals Enforcing An Order of the National Labor Relations Board."

the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(g) The complaint allegation concerning the suspension and discharge of Aaron Shields is dismissed.

(h) The complaint allegation concerning the alleged unlawful solicitation of grievances is dismissed.